

Exhibit A

In The Matter Of:
DRESSER-RAND COMPANY, v.
INGERSOLL RAND COMPANY,

October 28, 2014

Southern District Court Reporters

Original File EASRDREC.txt

Min-U-Script® with Word Index

October 28, 2014

Easrdrec Page 1

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x
4 DRESSER-RAND COMPANY,
5 DRESSER-RAND CANADA, INC.,
6 DRESSER-RAND GROUP, INC.
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8 Plaintiffs,
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10 v. 14 Civ. 7222 (KPF)
11 INGERSOLL RAND COMPANY,
12 INGERSOLL RAND COMPANY LIMITED,
13 Defendants.
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16 New York, N.Y.
17 October 28, 2014
18 2:00 P.M.
19 Before:
20 HON. KATHERINE POLK FAILLA
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22 District Judge
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| 1 not get behind the allegations or determine the veracity or 2 think about how a jury might resolve them. I simply should 3 look at the allegations in the Canadian lawsuit, see that if 4 they are taken as true, they would arguably allege something 5 that is indemnifiable, and therefore that implicates the 6 defense obligation but not the indemnity claims? 7 MR. ROSENBERG: Yes, your Honor, absolutely, very 8 analogous to insurance. If the allegations give rise to the 9 possibility of an indemnity obligation, then Ingersoll-Rand has 10 to pick up the defense. 11 THE COURT: Let me ask you this question, sir. I was 12 going to ask Ms. Neuner this, but I will ask you first, and 13 then she will know it is coming. The concern that I have is 14 wanting to avoid the possibility of, if you will, stepping on 15 the toes of the Canadian court. Similarly, I want to be 16 careful that I am not impermissibly or inappropriately creating 17 a risk of inconsistent judgments. I understand your argument 18 to me to be, sir, that I need not worry about that now, because 19 I must take the allegations as true for purposes of determining 20 the duty to defend. 21 MR. ROSENBERG: Yes, your Honor, only limited to the 22 duty to defend separate from the indemnity obligation. 23 THE COURT: Are you seeking indemnity at this point? 24 MR. ROSENBERG: Yes. 25 THE COURT: OK. | 1 and compensates the other, it comes back to this Court for this 2 Court to say, based on what happened in Canada, if you two 3 can't agree on indemnity, it's this Court's role to determine 4 whether there is an indemnity obligation. 5 Therefore, the defense obligation is ripe. The 6 indemnity obligation I think we need to wait and see what 7 happens in Canada. 8 THE COURT: I want to understand how that works out. 9 I'm not sure that there is a practical difference between the 10 two of. You will explain to me where I'm misperceiving the 11 facts. 12 The idea of the duty to defend is that you would reach 13 back to Ingersoll-Rand and say under the agreement you have the 14 right of first refusal, as it were, to defend this. But 15 doesn't that, too -- well, you're telling me it doesn't because 16 I just have to go on the facts. 17 If the duty to indemnify requires more than simply 18 analysis of the pleadings, by allowing the duty to defend or 19 finding a duty to defend in this case, have I not effectively 20 found a duty to indemnify? Because on these facts, on this 21 agreement, the choice is either they can do it themselves or 22 they can pay you back for doing it, correct? 23 MR. ROSENBERG: Yes, your Honor, to your last comment. 24 THE COURT: OK. 25 MR. ROSENBERG: The distinction here is that the duty | | |
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| 1 MR. ROSENBERG: However, however, the Court is a 2 hundred percent correct, that gets us into the troubled area of 3 stepping on the toes of the Canadian case. It gets us into the 4 challenge of inconsistent determinations. It raises a lot of 5 practical issues, which there is a solution to. 6 The problem is that these two parties entered into a 7 contract that said that obligation is going to be decided in 8 New York. I believe the solution to that, though, is that what 9 the contract really says is the New York court determines 10 whether there is an indemnity obligation based on what happens 11 in the Canadian court. 12 THE COURT: Right now not much has happened in the 13 Canadian court. 14 MR. ROSENBERG: It is moving slowly. I can report on 15 the schedule so that the Court is clearly aware of that. We 16 are in constant contact with counsel up in Saskatchewan. 17 What happens in the Canadian court is the Canadian 18 court is going to determine basically who is liable for the 19 fire and resulting damages that occurred at the Yara Belle 20 plant, be it Ingersoll-Rand or Dresser-Rand, and they are also 21 going to determine what we would call cross-claim issues. They 22 call it a little different up in the Canadian system. But they 23 would determine cross-claim issues. 24 Once that determination is made on the indemnity, 25 then, unless one party voluntarily acknowledges the obligation | 1 to defend and the duty to indemnify are different. The duty to 2 defend is based on the allegations that have been raised in the 3 Yara Belle complaint. The duty to indemnify is based upon the 4 finding in the Canadian court. An indemnification obligation 5 only exists if in fact -- 6 THE COURT: Fair enough. I think I get this. The 7 duty to defend encompasses basically the attorney's fees right 8 now and not necessarily any judgment at some later date, 9 whereas the duty to indemnify includes, if damages are 10 assessed, that plus the costs of defending? 11 MR. ROSENBERG: Correct. 12 THE COURT: I understand, thank you. I needed that 13 clarification. 14 MR. ROSENBERG: As the Yara Belle complaint indicates, 15 the plaintiff's claim is roughly \$32 million. The indemnity 16 issue clearly is premature. The defense issue, because of how 17 large that claim is, is ripe, and that is I think what needs to 18 be determined at first. 19 I will say, with all respect to both the Court and 20 opposing counsel, that is a little different from what we pled 21 in the complaint. We clearly pled in the complaint that the 22 duty to indemnify has to be determined now. We spent a lot of 23 time with Ms. Neuner's arguments. We spent a lot of time 24 looking at that. We are in agreement that it is premature to 25 decide the duty to indemnify now. | | |

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| <p>1 THE COURT: While you are in agreement, I want to hear</p> <p>2 a little bit more about this. My sense from looking at the</p> <p>3 pleadings and the papers in this case was that, maybe I'm wrong</p> <p>4 here, the parties were in discussions before your complaint was</p> <p>5 filed. There was an effort to resolve this dispute short of</p> <p>6 litigation, correct?</p> <p>7 MR. ROSENBERG: Yes, absolutely.</p> <p>8 THE COURT: On what other things are the parties in</p> <p>9 agreement? Anything? What I would like to know is how many</p> <p>10 issues do I really need to decide? I guess I'm grateful to you</p> <p>11 for this. You have come forward and said, I've looked at their</p> <p>12 arguments, and I now agree with a portion of them, and</p> <p>13 therefore this is our view on this. Is there anything else as</p> <p>14 to which the parties are in agreement at this time?</p> <p>15 MR. ROSENBERG: I don't know.</p> <p>16 THE COURT: I guess we will find out from the</p> <p>17 arguments. Fair enough. I appreciate that, sir. That was a</p> <p>18 very broad question. I think I really want to know, were you</p> <p>19 close to resolving this case?</p> <p>20 MR. ROSENBERG: No, never on the indemnity issue.</p> <p>21 Never on the indemnity issue. The parties entered a tolling</p> <p>22 agreement. The reason they entered into a tolling agreement,</p> <p>23 which I also think, in all candor to the Court, is probably not</p> <p>24 at issue at this point, our Canadian counsel made an argument</p> <p>25 that the case should have been heard in Alberta, not</p> | | <p>1 MS. NEUNER: Your Honor, I will present for Ingersoll-</p> <p>2 Rand.</p> <p>3 THE COURT: Very good. Let me ask you this. It may</p> <p>4 be that in light of what Mr. Rosenberg has said, some of the</p> <p>5 things you are going to tell me may have to be modified because</p> <p>6 you now understand he may be making slightly different</p> <p>7 arguments. I want to ask you a preliminary question, and then</p> <p>8 I want to ask you about your argument.</p> <p>9 What was a little bit surprising to me, but this just</p> <p>10 may be my own lack of experience in this particular area, is</p> <p>11 that it sounded like both sides wanted me to decide the issue</p> <p>12 and neither side wanted me to stay the matter. That was a</p> <p>13 surprise to me. Do you want me to decide the defense issue?</p> <p>14 MS. NEUNER: No, your Honor.</p> <p>15 THE COURT: OK. What I understood from your letter</p> <p>16 was you want me to find that this is not an indemnifiable</p> <p>17 event. Correct?</p> <p>18 MS. NEUNER: Your Honor, think the thrust of our</p> <p>19 motion to dismiss is that the entire action is premature. We</p> <p>20 do not yet have a justiciable case or controversy, because the</p> <p>21 Canadian action has not determined the basis upon which any</p> <p>22 loss has been imposed. Do you want me to unpack that?</p> <p>23 THE COURT: Please. As you do so, let me have you</p> <p>24 keep in mind one case. There is a Second Circuit case known as</p> <p>25 Associated Indemnity v. Fairchild. It stands for the</p> | |
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| <p>1 Saskatchewan. I'm not exactly sure why, but he did. There</p> <p>2 were certain defenses that were running in Alberta that were</p> <p>3 not running under Saskatchewan law. In order to preserve those</p> <p>4 defenses, we entered into the tolling agreement.</p> <p>5 They filed what we would consider a motion either to</p> <p>6 dismiss or change venue from Saskatchewan to Alberta. The</p> <p>7 court in Canada denied that. Under the Saskatchewan procedure,</p> <p>8 I think the tolling agreement really becomes irrelevant. So,</p> <p>9 the case is in Saskatchewan.</p> <p>10 I did indicate to the Court I would say a little bit</p> <p>11 about the schedule as to the Canadian case. They are in the</p> <p>12 process now of what we would call exchanging documents. They</p> <p>13 have made a demand for articulation of damages, which is a</p> <p>14 formal process in that court. Yara Belle has not yet responded</p> <p>15 to either one of them.</p> <p>16 The answer is, obviously, a little bit different. You</p> <p>17 just submit your defenses. I don't think that has been filed</p> <p>18 yet. They have some time to do so. I think that is going to</p> <p>19 be filed in November. Whether we assert a cross-claim against</p> <p>20 Ingersoll-Rand is really dependent upon what happens today, but</p> <p>21 I expect that will occur.</p> <p>22 THE COURT: Thank you very much. I might get back to</p> <p>23 you in a few minutes.</p> <p>24 Ms. Neuner, will I be hearing from you or from your</p> <p>25 co-counsel on this?</p> | | <p>1 proposition, in a case involving insurance coverage, which I</p> <p>2 think is slightly different from what we have here, that the</p> <p>3 determination of coverage and the determination of whether</p> <p>4 something is indemnifiable under an insurance contract is a</p> <p>5 determination that can be made while the action as to which the</p> <p>6 indemnity claim is being sought is ongoing. There is that. I</p> <p>7 checked, and that actually gets cited with some frequency.</p> <p>8 The question to you was whether there is something</p> <p>9 about this contract case, because this is not an insurance</p> <p>10 case, that renders the analysis different.</p> <p>11 MS. NEUNER: Your Honor, you are spot-on with all your</p> <p>12 intuitions. Let me start by saying I think that in today's</p> <p>13 conference we are making good progress. I, too, am grateful to</p> <p>14 Mr. Rosenberg for the candor with which he has approached his</p> <p>15 representations today.</p> <p>16 As I understand it, what we now have from Dresser-Rand</p> <p>17 is an admission that any request about an indemnification of a</p> <p>18 final judgment up in the northern area of Canada, Saskatchewan,</p> <p>19 is premature. We absolutely agree with that. The reason why</p> <p>20 is that one cannot know if Dresser-Rand is going to be found</p> <p>21 liable in Saskatchewan, if Ingersoll-Rand is going to be found</p> <p>22 liable in Saskatchewan, if both are, if there is going to be an</p> <p>23 apportionment of fault, or whether there is going to be a</p> <p>24 defense verdict. So, literally as to any final judgment, there</p> <p>25 is no determination as to the basis for that loss being imposed</p> | |

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| <p>Easrdrec Page 13</p> <p>1 at this point in time.</p> <p>2 Now what I think we need to tackle is the question of</p> <p>3 this defense. First let me say this. There is a very</p> <p>4 important philosophical and legal distinction between a</p> <p>5 contractual duty to indemnify and an insurance policy. I do a</p> <p>6 lot of insurance coverage work. I am absolutely certain that</p> <p>7 New York law has decided no more than 300 times that a duty to</p> <p>8 defend is broader for an insurance policy than a duty to</p> <p>9 indemnify.</p> <p>10 In New York they call it either the four corners rule</p> <p>11 or the eight corners rule. You would take, as the judge, the</p> <p>12 four corners of the underlying complaint, here the six-page</p> <p>13 Yara Belle claims, complaint, put it side by side with the four</p> <p>14 corners of that policy, and you would search for, as the fact</p> <p>15 determiner, is there any possible claim for coverage within</p> <p>16 this Yara Belle complaint that would fit within the corners of</p> <p>17 the policy, and if so, the insurer has a duty to defend.</p> <p>18 Why? Because it's liability insurance. Part of those</p> <p>19 premiums were for the protection that when an insurer receives</p> <p>20 the third-party claims, they will have the peace of mind that</p> <p>21 the insurer is going to step forward and pay their defense</p> <p>22 costs.</p> <p>23 Let's contrast that with the contractual obligation to</p> <p>24 indemnify, which is what we have here. The context is that</p> <p>25 this was a purchase agreement between a private equity group,</p> | <p>Easrdrec Page 15</p> <p>1 the three, your Honor, are solely against Dresser-Rand, one for</p> <p>2 negligence on Dresser-Rand Canada's part and the second for</p> <p>3 breach of contract by Dresser-Rand Canada. Why is that?</p> <p>4 Because Dresser-Rand Canada was the sole entity that was</p> <p>5 servicing this expander from 2004 to the time of its failure in</p> <p>6 August of 2012.</p> <p>7 The third claim in the complaint is asserted against</p> <p>8 both Ingersoll-Rand and the Dresser-Rand entities, and that is</p> <p>9 essentially a duty to warn. You could read this to say that</p> <p>10 Ingersoll-Rand is being sued solely for Ingersoll-Rand's</p> <p>11 actions and alleged duty to warn about the expander's</p> <p>12 components, and Dresser-Rand is being sued for Dresser-Rand's</p> <p>13 actions and alleged duty to warn about the components in this</p> <p>14 expander.</p> <p>15 So, in some ways, because the complaint is six pages</p> <p>16 and is fairly ambiguous, you could say that both entities are</p> <p>17 being sued for their own individual acts, not Dresser-Rand</p> <p>18 being sued for Ingersoll-Rand and vice versa. It is simply too</p> <p>19 early to tell the true theories of the liability there.</p> <p>20 But when you go into the EPA, this merger document</p> <p>21 that was put together ten years ago by my firm and Skadden, you</p> <p>22 see that the products liability loss has a very important</p> <p>23 distinction. It says that for a products liability loss, there</p> <p>24 is an exception in the definition -- your Honor, I'm at</p> <p>25 9.10(g) -- an exception for acts or omissions following the</p> |
| <p>Easrdrec Page 14</p> <p>1 First Reserve, and Ingersoll-Rand, a diversified strategic</p> <p>2 company engaged in heavy industrial machinery manufacturing and</p> <p>3 distribution.</p> <p>4 As part of the normal merger and acquisition</p> <p>5 representations and covenants, you have section 8 indemni-</p> <p>6 fication obligations. This is not an insurance policy. In</p> <p>7 fact, it is quite clear, and you have already picked up on</p> <p>8 this, that the defense discussion is about an opportunity to</p> <p>9 defend a products liability loss. It is not an obligation.</p> <p>10 And Mr. Rosenberg characterized this correctly.</p> <p>11 In this situation where Dresser-Rand is making the</p> <p>12 request for a indemnity to Ingersoll-Rand, Ingersoll-Rand, if</p> <p>13 it believes that it is responsible for this alleged loss, can,</p> <p>14 at its election, you said the right of first refusal, come</p> <p>15 forward, say I'm going to assert a defense, I'm going to</p> <p>16 appoint Canadian counsel of my selection, I'm going to control</p> <p>17 the strategic decision-making, where we are going to fight</p> <p>18 this, whether we are going to settle it. Why? Because</p> <p>19 Ingersoll-Rand has a determination up front that it is going to</p> <p>20 be liable for any loss in the end, so it might as well control</p> <p>21 the picture as it gets down the Canadian litigation track.</p> <p>22 However, in this particular situation we do not have a</p> <p>23 determination by Ingersoll-Rand that is in fact on the hook for</p> <p>24 the indemnity. Why is that? Because when you look at this</p> <p>25 Yara Belle complaint, there are three causes of action. Two of</p> | <p>Easrdrec Page 16</p> <p>1 closing. This means that Ingersoll-Rand was saying that</p> <p>2 following the closing, if there were acts or omissions by</p> <p>3 Dresser-Rand with respect to the machinery, Ingersoll-Rand was</p> <p>4 not making that an indemnified claim. It literally was</p> <p>5 excluded in the definition.</p> <p>6 THE COURT: Your argument is not that Ingersoll-Rand</p> <p>7 no longer had a duty to warn after the closing. You're saying</p> <p>8 that it had its duty to warn and Dresser-Rand had its duty to</p> <p>9 warn, but Dresser-Rand was not able post-closing to receive</p> <p>10 indemnity for any violations of the duty to warn? That's the</p> <p>11 argument your now making to me?</p> <p>12 MS. NEUNER: Yes, your Honor.</p> <p>13 THE COURT: OK.</p> <p>14 MS. NEUNER: And to the extent Dresser-Rand misper-</p> <p>15 formed, didn't do a good job in its eight years of servicing of</p> <p>16 its expander, and if that is the reason for the failure and the</p> <p>17 fire, that's Dresser-Rand's post-closing acts or omissions for</p> <p>18 which it is responsible. It is not even within the definition</p> <p>19 of an indemnifiable claim.</p> <p>20 Let me point out to you one other provision, if I</p> <p>21 could, in the EPA that shores up this thinking. I wouldn't</p> <p>22 want there to be any misconception that Ingersoll-Rand's</p> <p>23 indemnity is so broad that it actually would capture post-</p> <p>24 closing negligence by Dresser-Rand. The point I would bring</p> <p>25 you to, your Honor, is 8.1 subpart (b). This is the reciprocal</p> |

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| <p>1 indemnification.</p> <p>2 Ingersoll-Rand, when it was selling off Dresser-Rand,</p> <p>3 said we are going to give you, First Reserve, a duty to</p> <p>4 indemnify for things preclosing, but when there are things</p> <p>5 post-closing, if Ingersoll-Rand gets named in that lawsuit,</p> <p>6 Ingersoll-Rand wants protection.</p> <p>7 The buyers, First Reserve, gave an indemnity back to</p> <p>8 Ingersoll-Rand. Here it specifically says that the indemnity</p> <p>9 for Ingersoll-Rand, our clients, includes any losses as a</p> <p>10 result of the conduct of business of any member of the</p> <p>11 Dresser-Rand group after the closing date. That is Roman (ii)</p> <p>12 under 8.1.</p> <p>13 THE COURT: If you had really good distance vision,</p> <p>14 you would see that I underlined it in mine. I guess the</p> <p>15 question is, why is Ingersoll-Rand not seeking indemnification?</p> <p>16 Or are they?</p> <p>17 MS. NEUNER: Your Honor, great question. The</p> <p>18 indemnity here that you see is from the seller. The seller is</p> <p>19 First Reserve. First Reserve acquired Dresser-Rand in 2004 and</p> <p>20 then spun off Dresser-Rand in 2007 in an IPO. We actually have</p> <p>21 been trying to track down whether this ongoing indemnification</p> <p>22 obligation in this EPA was transferred from First Reserve to</p> <p>23 Dresser-Rand at the time of the spin-off. We have asked Mr.</p> <p>24 Rosenberg for that information, and it has not yet been</p> <p>25 forthcoming.</p> | | <p>1 indemnities. Yes, there is this provision which Mr. Rosenberg</p> <p>2 and I have talked about, which is 8.1(f), which talks about</p> <p>3 real-time reimbursement of defense fees as they are incurred.</p> <p>4 But, your Honor, I will point you to the language at the very</p> <p>5 start that says, "This applies where an indemnified party shall</p> <p>6 be entitled to indemnification."</p> <p>7 That is our central dispute. We do not believe at</p> <p>8 this point that Dresser-Rand is entitled to indemnification.</p> <p>9 THE COURT: Let me ask you this, Ms. Neuner, at the</p> <p>10 risk of seeming like I'm beating a dead horse or at the risk of</p> <p>11 seeming that I simply don't understand what is going on here.</p> <p>12 Are you contemplating a motion in which you ask me to stand</p> <p>13 down and do nothing until the Canadian courts make some</p> <p>14 determination here, or are you asking me to make a</p> <p>15 determination on the four corners or the eight corners, however</p> <p>16 you would like to look at it, that there can be no</p> <p>17 indemnifiable event in light of the pleadings?</p> <p>18 Both you and Mr. Rosenberg are telling me I can look</p> <p>19 at the pleadings. I think that's what you are saying. He is</p> <p>20 saying I look at them and I must find a duty to defend. You</p> <p>21 are saying I look at them and I can only come to the conclusion</p> <p>22 that it is a nonindemnifiable event.</p> <p>23 MS. NEUNER: Your Honor, I would pull back from there.</p> <p>24 I'm not going to ask you to actually make a declaratory</p> <p>25 judgment in our favor. What I would say is this. I think it</p> | |
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| <p>1 It is very, very, very obvious that what you will have</p> <p>2 here at the end of the day are cross-claims for indemni-</p> <p>3 fication. In fact, in Canada, Canadian counsel for Ingersoll-</p> <p>4 Rand will be putting in its notice of defense and its statement</p> <p>5 of cross-claim against Dresser-Rand in the Saskatchewan action</p> <p>6 in the next week. So, the Canadian action will in fact have</p> <p>7 Ingersoll-Rand's cross-claims against Dresser-Rand before Madam</p> <p>8 Justice Pritchard, who is the ultimate decision make there.</p> <p>9 I think you have rightly determined the risk of</p> <p>10 proceeding forward with this case, which is stepping on the</p> <p>11 toes of Madam Justice Pritchard and coming to an inconsistent</p> <p>12 determination. It could very well be that the ultimate loss,</p> <p>13 if any, that is borne by Dresser-Rand will be as a result of</p> <p>14 its own acts and omissions after the closing of this merger, in</p> <p>15 which case Ingersoll-Rand never, never, never had an indemnity</p> <p>16 obligation.</p> <p>17 The key to this, and I think the barest point of</p> <p>18 dispute between the parties, is that our contractual</p> <p>19 indemnification obligation is the same whether the loss that is</p> <p>20 being sought is defense invoices or resulting judgment. There</p> <p>21 is no separate duty to defend that is broader than the duty to</p> <p>22 indemnify.</p> <p>23 When you said, if I decided a defense obligation,</p> <p>24 wouldn't I in fact be deciding an indemnity obligation, you are</p> <p>25 absolutely right. It's a section 8, which is about</p> | | <p>1 is appropriate to dismiss the case at this point because it is</p> <p>2 nonjusticiable because there are simply not enough facts</p> <p>3 developed in the Canadian action to determine the basis upon</p> <p>4 which loss, which is a capitalized term in the EPA, is being</p> <p>5 incurred. I could ask you to stay it, but I don't think that</p> <p>6 is wise in terms of your own docket, because the Canadian</p> <p>7 action could go on for years.</p> <p>8 THE COURT: I'll say this. If that is the only thing</p> <p>9 you are concerned about, I have the ability to basically just</p> <p>10 add a number to the docket and it goes into a suspense docket.</p> <p>11 Don't worry about me. That should not be the issue.</p> <p>12 MS. NEUNER: OK.</p> <p>13 THE COURT: And I am genuinely interested in the</p> <p>14 issues involved in this case. So don't worry that I would be</p> <p>15 happy to get it off my docket, no.</p> <p>16 I want to be sure that if I have enough information in</p> <p>17 front of me and should be deciding the issue, that I do, and I</p> <p>18 can do that in a way that does not offend or friends to the</p> <p>19 north. Similarly, if I should not be because of the position</p> <p>20 of that, that's what I would like to know.</p> <p>21 We are here today on a pre-motion conference, which to</p> <p>22 me suggests that a motion is forthcoming. I think it is coming</p> <p>23 from you.</p> <p>24 MS. NEUNER: Yes.</p> <p>25 THE COURT: I would like to know what it is. Let's go</p> | |

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| <p>Easrdrec Page 21</p> <p>1 that far.</p> <p>2 MS. NEUNER: Your Honor, ours is a motion to dismiss</p> <p>3 for a lack of a justiciable case or controversy.</p> <p>4 THE COURT: All right.</p> <p>5 MS. NEUNER: I have said this to Mr. Rosenberg. If at</p> <p>6 the end of the Canadian action liability is imposed on Dresser-</p> <p>7 Rand for the full amount sought of \$32 million and Madam</p> <p>8 Justice Pritchard makes a finding that it is 100 percent the</p> <p>9 fault of Ingersoll-Rand, at that point we would have a basis to</p> <p>10 say this fits within an indemnifiable loss. Then, honestly,</p> <p>11 you wouldn't be seeing us, because the parties would be able to</p> <p>12 work that out.</p> <p>13 You could put it on the suspense calendar for five</p> <p>14 years, but it may be that at the end of the Canadian action</p> <p>15 there is again not a justiciable controversy, because the</p> <p>16 parties have come to their own conclusion.</p> <p>17 Suppose the converse were true. Suppose Madam Justice</p> <p>18 Pritchard said the judgment is imposed a hundred percent on</p> <p>19 Ingersoll-Rand but the fault happened July 2012, a month before</p> <p>20 the fire, because Dresser-Rand somehow made a mistake in the</p> <p>21 final servicing.</p> <p>22 Then we would have justiciable claim for indemnity and</p> <p>23 it may turn out that it is Dresser-Rand who owes that. If they</p> <p>24 wouldn't agree to pay, then yes, we do agree that New York is</p> <p>25 the right forum under the EPA, because we have a concrete</p> | <p>Easrdrec Page 23</p> <p>1 specifically contracted that the indemnity would not apply to</p> <p>2 special damages. New York law is very clear that business</p> <p>3 interruption losses are special damages or consequential</p> <p>4 damages or lost profits. Canadian law literally defines</p> <p>5 business interruption losses as lost profits.</p> <p>6 We have a dispute about 19 million that isn't even</p> <p>7 within definition of an indemnifiable loss. I say that to you</p> <p>8 because it is part of our motion to dismiss, and I want to give</p> <p>9 Mr. Rosenberg a fair chance to respond.</p> <p>10 THE COURT: I appreciate that.</p> <p>11 MS. NEUNER: Thank you.</p> <p>12 THE COURT: Mr. Rosenberg, anything you would like to</p> <p>13 respond to Ms. Neuner?</p> <p>14 MR. ROSENBERG: Yes, your Honor. I'll take them kind</p> <p>15 of in reverse order.</p> <p>16 Starting with the business interruption loss, that is</p> <p>17 a prime example of something that is decided in the New York</p> <p>18 court, not the Canadian court, as far as the indemnity</p> <p>19 obligations of each other. That is something that whether or</p> <p>20 not New York law applies, the court and the parties determined</p> <p>21 we are going to let New York law apply, we are going to let</p> <p>22 that dispute be decided here. It gives a basis for why we have</p> <p>23 this case here today.</p> <p>24 The resolution issue. The Court brought up</p> <p>25 resolution. I actually think there is nothing we can do about</p> |
| <p>Easrdrec Page 22</p> <p>1 dispute at that point for an entitled indemnifiable loss.</p> <p>2 THE COURT: Let me ask this. I want to make sure I'm</p> <p>3 not getting this wrong. I am looking at the plaintiff's</p> <p>4 response, and it is on the third page. There is some</p> <p>5 discussion about the benefits of having both parties in the</p> <p>6 Canadian case. I think it has been clarified for me today that</p> <p>7 regardless of how this particular dispute is resolved,</p> <p>8 Ingersoll-Rand is in that Canadian action any way you look at</p> <p>9 it. Correct?</p> <p>10 MS. NEUNER: Absolutely, your Honor, and the cross-</p> <p>11 claim will be in that Canadian action.</p> <p>12 THE COURT: To the extent the concern would be that</p> <p>13 both parties need to be up in Canada to figure out how to</p> <p>14 resolve this perhaps in a way short of five years of</p> <p>15 litigation, you are talking about you're both in anyway.</p> <p>16 MS. NEUNER: Yes, your Honor.</p> <p>17 THE COURT: I understand that. Is there anything</p> <p>18 else? Then I would like to hear back from Mr. Rosenberg.</p> <p>19 MS. NEUNER: Your Honor, the only other point that we</p> <p>20 have that went unaddressed in the opposition letter was the</p> <p>21 very real argument that we would put into our motion to dismiss</p> <p>22 that of the amount of loss that Yara Belle seeks, 13 million of</p> <p>23 it is for property damage for the facility, 19 million, which</p> <p>24 is roughly two-thirds, is for business interruption losses.</p> <p>25 You will note in the EPA at 8.1(g) that the parties</p> | <p>Easrdrec Page 24</p> <p>1 it, but the issue of resolution up in Canada is going to be</p> <p>2 extremely difficult under the circumstances, because I think</p> <p>3 both parties believe they are the smaller payor and the other</p> <p>4 party is the primary payor. That is going to make that very</p> <p>5 difficult when we are talking about so much money.</p> <p>6 THE COURT: Your argument is not really an argument</p> <p>7 that I can use, but what you are saying is that as a practical</p> <p>8 matter, if you were both aligned inasmuch as one of you is</p> <p>9 covering the costs of the other, you would have perhaps more of</p> <p>10 an interest to work with each other to see how it can be</p> <p>11 resolved.</p> <p>12 MR. ROSENBERG: Exactly. This is going to be very</p> <p>13 difficult. I can imagine the two the gentlemen getting in a</p> <p>14 room saying I'm the minor party, you're the minor party, etc.</p> <p>15 It's difficult.</p> <p>16 Also, why is there a justiciable controversy here? We</p> <p>17 all can surmise or speculate as to what the Canadian court can</p> <p>18 do. But the Canadian court can also in its determinations</p> <p>19 leave us in a position of having immense interpretation by this</p> <p>20 Court to determine the indemnity obligation.</p> <p>21 Yes, they may say Ingersoll-Rand is entirely at fault,</p> <p>22 they may say Dresser-Rand is entirely at fault, but they could</p> <p>23 do a host of other things. That is why it is this Court that</p> <p>24 interprets that decision to determine the indemnity obligations</p> <p>25 and makes this a justiciable controversy.</p> |

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| <p>Easrdrec Page 25</p> <p>1 THE COURT: I understand. But I think Ms. Neuner's 2 point, and I am neither agreeing nor disagreeing with it, is 3 yes, someday we will have to do that if we can't come to an 4 agreement, but for now it is too soon, is what she is saying. 5 MR. ROSENBERG: On the indemnity issue, even though in 6 our letter we have cited numerous cases, including the 7 Associated Indemnity case and the Rosen v. Mega Bloks case, 8 which indicates that contractual indemnity obligations is 9 really not a major distinction from the insurance indemnity 10 obligations, what we are saying is yes, separate the indemnity 11 from the defense. 12 The indemnity this case needs to maintain jurisdiction 13 over and interpret what happens up there whenever it happens. 14 The defense obligation is distinguishable. The defense 15 obligation is in fact a justiciable matter that needs to be 16 determined now based on, as that case law indicates, the 17 allegations in the complaint right now. It could not be in, 18 our opinion, clearer. 19 Ms. Neuner indicated the various causes of action. 20 Yes, the Yara Belle complaint is very succinct in that regard. 21 There are three causes of action. The second and third cause 22 of action are clearly claims limited to the conduct of Dresser- 23 Rand. We don't believe those claims have merit. 24 But also that is going to get us into an interpret- 25 ation of the arising out of language in that product liability</p> | <p>Easrdrec Page 27</p> <p>1 this were an insurer-insured situation, would you agree that 2 the duty to defend could be determined simply based on the 3 pleadings in the Canadian court? 4 MS. NEUNER: Yes, your Honor, because that is New York 5 law, yes. 6 THE COURT: It seems to me that one difference between 7 the parties is that you see Associated Indemnity Corporation 8 and things of that type and understand it and limit it to the 9 insurance context and not to this contractual context. 10 MS. NEUNER: Absolutely, your Honor, because that is 11 the law. 12 THE COURT: You both have told me what you believe the 13 law is. I understand. As much as I thought that we could 14 possibly resolve this short of a motion, I really didn't think 15 that was going to happen. It doesn't seem that that is the 16 case. While I appreciate very much the nuances that Mr. 17 Rosenberg has announced today, there are still some things that 18 do need to get resolved. So, a motion is in the offing. 19 Let me look at the calendar. I am ware that there are 20 holidays coming up. My hope is to try and wreck as few of them 21 as possible for people. Ms. Neuner, would you be able to 22 submit something on the 1st of December? 23 MS. NEUNER: Yes, your Honor. 24 THE COURT: Mr. Rosenberg, would you be able to submit 25 a response on the 5th of January or the 7th of January?</p> |
| <p>Easrdrec Page 26</p> <p>1 definition that is set forth in the EPA. It is our contention 2 that that still arises out of Ingersoll-Rand's efforts of 3 putting it into the stream of commerce. 4 THE COURT: I'm just asking you to slow down a little 5 bit, sir, for the reporter. 6 MR. ROSENBERG: I am a New Yorker by heart. 7 Those second and third causes of action do arise out 8 of Ingersoll-Rand's efforts of putting them in the stream of 9 the commerce. We have a disagreement over the merits of those 10 claims, and I understand that's going to be decided elsewhere. 11 8.1(b), the indemnity due from Dresser-Rand to 12 Ingersoll-Rand, Ms. Neuner and I will have discussions about 13 the notice issue. That is not before this Court. That will 14 get resolved. That is not a problem. But I don't think that 15 is pertinent to what this Court needs to decide. 16 This Court needs to look at the other provisions of 17 8.1 that create the indemnity obligation. I believe what this 18 Court needs to do is maintain jurisdiction over that, to 19 determine what happens in Canada. The defense obligation is 20 ripe, and this Court needs to determine the defense obligation 21 based on the allegations in the complaint at this time. 22 THE COURT: Thank you. 23 Ms. Neuner, one quick follow-up question based on what 24 Mr. Rosenberg was saying. If this were not the actual 25 situation where there is a contract between the parties, if</p> | <p>Easrdrec Page 28</p> <p>1 MR. ROSENBERG: That's fine, your Honor. 2 THE COURT: 7th of January, all right. Then, Ms. 3 Neuner, that would make your response due the 21st of January, 4 your reply. 5 MS. NEUNER: Very good, your Honor. 6 THE COURT: I will ask the parties a couple of things. 7 Number one, please get a copy of today's transcript. I don't 8 need it tomorrow, but I would like to see it in advance of the 9 parties' briefing. There were a lot of very interesting points 10 made today, and I wish to study up on them before I actually 11 get the papers. 12 Secondly, I don't think on these facts that we need 13 extensions of the page limits. I think you can get your 14 arguments in as need be. 15 Number three, and this is just perhaps too much to 16 ask, but I'm going to anyway. If there is out there a more 17 legible copy of the purchase agreement, I would love to see it. 18 I have been able to get things downloaded from ECF, but at this 19 point it's been scanned and it is just not as good. If it 20 exists, I would like to have it, but it is not urgent. 21 MS. NEUNER: OK. We can work together. 22 MR. ROSENBERG: We can stipulate to the key language 23 of 8, 9. 24 MS. NEUNER: We will work together to make sure you 25 get one delivered directly to chambers that is a good and</p> |

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1 legible copy.

2 THE COURT: Thank you. I appreciate that indulgence.

3 I believe that is all of the issues on my list. Hold
4 on one second, please.

5 I will tell you, although this is a little bit of a
6 formality, I believe our calendar lists an initial pretrial
7 conference for the 19th of November. We will adjourn that.
8 What I will do is issue a scheduling order in the next day or
9 so that has the dates we have just been talking about and also
10 adjourns the pretrial conference for the 19th. Obviously, it
11 is less important now that we have had this conference.

12 Mr. Rosenberg, is there anything else that you want to
13 call to my attention?

14 MR. ROSENBERG: No, your Honor. Thank you.

15 THE COURT: Ms. Cmielewski, you are allowed to speak
16 as well.

17 MS. CMIELEWSKI: I have nothing to add. Mr. Rosenberg
18 here did a wonderful job.

19 THE COURT: Ms. Neuner, same thing, anything else?

20 MS. NEUNER: No, your Honor. Thank you for your time.

21 THE COURT: Mr. Leibowitz, anything from you, sir?

22 MR. LEIBOWITZ: Nothing, thank you.

23 THE COURT: I feel if people are going to sit at
24 counsel table, they ought to have an opportunity to speak. Mr.
25 Grenell?

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1 MR. GRENELL: Nothing. Thank you, your Honor.

2 THE COURT: Thank you all for bringing these issues to
3 light today and thank you for the attention that you have been
4 paying to the documents and the law in this case. I'm serious
5 when I say these are very interesting issues.

6 (Adjourned)

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